No. 14846

IN THE

United States Court of Appeals For the Ninth Circuit

LEO ELWERT, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

This is an appeal from a judgment convicting appellant, after a jury trial, on three counts of an indictment filed November 20, 1953, charging willful attempts to evade and defeat income taxes due and owing by him for the calendar years 1947, 1948 and 1949, in violation of Section 145(b) of the Internal

Revenue Code of 1939. (Supp. R. 1-4.)[1] Jurisdiction was conferred on the District Court by 18 U.S.C., Section 3231. On March 31, 1955, a verdict of guilty was entered as to each count. (Supp. R. 36.) On April 14, 1955, a motion for arrest of judgment (Supp. R. 37) and a motion for judgment of acquittal, and in the alternative for a new trial (Supp. R. 38-49, were filed.[2] These motions were denied. (Supp. R. 50.) Judgment was entered on April 29, 1955. (Supp. R. 51-52). Within ten days and on May 2, 1955, notice of appeal was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the indictment charging willful attempt to evade taxes stated an offense against the United States.

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[1] Record references (R.) are to the three volume reporter's transcript of testimony. Supplemental record references (Supp. R.) are to the fifty-three page transcript of written indictment, motions and orders filed at the District Court.

[2] Rules 29(b), 33 and 34, Federal Rules of Criminal Procedure, specify five days after the verdict of guilty as the time within which to bring these motions. Rule 33 and 34, Federal Rules of Criminal Procedure provide an alternative "within such further time as the court may fix during the 5-day period." It does not appear on the face of the record whether the court, between March 31, 1955, and April 5, 1955, fixed a further time in which to bring the motions for new trial and arrest of judgment. See *Marion* v. *United States,* 171 F. 2d 185 (C.A. 9th), certiorari denied, 337 U.S. 944; *Pugh* v. *United States,* 197 F. 2d 509 (C.A. 9th), reversed on other grounds upon rehearing, 212 F. 2d 761. However, the sufficiency of the evidence was raised by timely oral motions for judgments of acquittal. (R. 727-728, 844.)

2. Whether the evidence was sufficient to support the verdict.

3. Whether the trial court's instructions were fair and complete.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.* —Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * *

(26 U.S.C. 1952 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

Rule 7. THE INDICTMENT AND THE INFORMATION

* * * *

(c) *Nature and Contents.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclu-

sion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

* * * *

STATEMENT

On November 20, 1953, an indictment was returned against appellant charging him with willful attempt to evade his income taxes for the years 1947, 1948 and 1949, in violation of Section 145(b) of the Internal Revenue Code of 1939. The indictment alleged that the willful attempts to evade taxes for the years 1947 and 1948 were committed by filing false returns. For the year 1949 the willful attempt to evade taxes was alleged to have been committed by failing to make an income tax return, by failing to pay the tax, and by concealing and attempting to conceal his true gross income. The amounts of net income and the taxes thereon, as reported in the returns and as corrected, were alleged to be as follows (Supp. R. 1-4):

Year		Reported Income	Reported Tax	Corrected Income	Corrected Tax
Count I	(1947)	$27,793.94	$10,670.68	$39,822.86	$17,981.38
Count II	(1948)	27,015.34	5,583.76	48,731.82	15,919.48
Count III	(1949)	-0-	-0-	9,007.81	1,669.00

Appellant moved to dismiss all three counts of the indictment. (Supp. R. 5, 7.) The motions were denied. (R. 7; Supp. R. 8.) In response to appellant's motions, bills of particulars were filed without opposition. (Supp. R. 10-15.) On March 22, 1955, the trial commenced. An objection to the introduction of evidence was overruled. (R. 9.) On March 29, 1955, a motion to strike the Government's evidence was made and denied. (R. 727; Supp. R. 27-29, 34.) At the close of the Government's case, and again at the close of all evidence, motions for judgment of acquittal were made and denied. (R. 727-728, 844; Supp. R. 30-35.) On March 31, 1955, after eight days of trial, the jury returned on each of the three counts a verdict of guilty. (Supp. R. 36.) Motions for arrest of judgment, judgment of acquittal and a new trial were made and denied. (Supp. R. 37-50.) On April 29, 1955, the District Court sentenced appellant to imprisonment for eighteen months on each of the three counts, with sentences to run concurrently, and imposed a fine of $1,000 each on Counts I and II and $500 on Count III, for a total of $2,500. (Supp. R. 51-52.) Notice of appeal was filed on May 2, 1955.

For the years involved Leo Elwert and his wife Mary Elwert were engaged in a business partnership known as the Tualatin Valley Nurseries. The nursery

was located in the vicinity of Sherwood, Oregon (R. 518), approximately twenty miles southwest of Portland (R. 184). Besides growing and selling nursery stock the Tualatin Valley Nurseries engaged in other operations incuding the production and sale of grapes, nuts and dried prunes. (R. 122, 791-795.) To prove its case the Government established by specific items the amount of unreported income earned by Tualatin Valley Nurseries. Included in Appendix to this brief are some tables showing each step of proof upon which the additional partnership income was calculated for each of the three years involved. One-half of this additional income for 1947 and 1949 was attributed to appellant as reportable on his individual returns for those years. (R. 701-703, 715-716.) All of the additional partnership income was attributed to appellant and his wife as reportable on their joint return for 1948. (R. 705-706.)

The evidence to support the verdict may be summarized as follows:

For some time prior to the period here involved, appellant Leo Elwert and his wife Mary Elwert had maintained two bank accounts, a joint account in the Sherwood bank[3] and the Tualatin Valley Nurseries

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[3] Throughout the trial the Citizens Branch of Sherwood was referred to as the Sherwood Bank. In 1951, the Citizens Bank of Sherwood merged with the Commercial Bank of Oregon. The Sherwood bank became known as the Sherwood Branch of the Commercial Bank of Oregon. On November 29, 1954, the Commercial Bank of Oregon merged with the United States National Bank. The Sherwood bank then became known as the Sherwood Branch of the United States National Bank. (R. 651-652.)

account in the Tigard Branch of the United States National Bank. (R. 359, 653-654.) From the nursery, these two banks were approximately one and one quarter miles and eight miles away, respectively. (R. 815.) Into the two accounts of these banks they deposited the business receipts reported on their income tax returns. (R. 19, 220-221.) During the course of the three years here involved, appellant used accounts in more distant banks to which he made deposits of income not reported on his tax returns. (See Tables I-III, Appendix, *infra.*)

The Tax Evasion Period

On January 14, 1947, appellant went to Portland and there opened a personal checking account at the Southwest Portland Branch of the First National Bank. (R. 104, 108, 111.) Appellant gave 4930 Southeast 72nd as his address and Sunset 0979 as his telephone number. The address and telephone number were not his but those of a friend, A. D. Schmidt. (R. 107, 112, 179-180.) During the early part of 1947, he deposited to this account three checks representing proceeds from sales of nursery stock. These items were not reported on his income tax return for 1947. (Ex. 8, 11, 12, 14, 15; R. 18-19, 66, 85, 94, 96, 97-99, 105, 106, 635, 640, 645; see Table I, Appendix, *infra.*) The bank account was closed on January 23, 1948. (R. 111.)

On March 12, 1947, appellant and A. D. Schmidt went to the Portland Branch of the Bank of California where Schmidt had an account. Appellant gave

Schmidt a check dated February 21, 1947, which had been drawn on a bank in Colorado in the sum of $2,458.55 by one J. W. Cutter. Schmidt deposited this check to his account. He then drew upon his account a check in the same amount and delivered it to appellant. Then on this same date appellant opened an account in this bank with a deposit of Schmidt's check for $2,458.55. (Ex. 27, 36, 38-A, 39-A, 40; R. 166-169, 185-186, 201, 204.) On several other occasions during the following three months appellant met Schmidt in Portland and each time gave him a check representing a sale of nursery stock. Each time appellant waited at Merrill-Lynch's brokerage house while Schmidt went a block away to the bank and returned. On some occasions Schmidt deposited the check in his own account and then returned to give appellant a check drawn on the same account. (Ex. 16, 18, 21, 22, 40; R. 113-115, 120-122, 129, 133-134, 136, 137-138, 161, 163, 171-172, 177-179; see Table I, Appendix, *infra.*) On other occasions Schmidt deposited the check to appellant's account at this bank. (Ex. 17, 23, 24; R. 117-119, 129, 138-140, 161-162, 202-203; see Table I, Appendix, *infra.*) Appellant closed this account on August 22, 1947. (R. 199, 204.) Included among the checks deposited by Schmidt was one check for $12,750.[4] This particular check dated April 4, 1947, represented a sale of Concord grapes to Church Grapejuice Company. (R. 120-122, 163.) All of these checks were

[4] In recalling the circumstances under which he had handled this check for $12,750, Schmidt testified that (R. 163) "He [Elwert] asked me to deposit it to my account and issue checks for smaller amounts at different dates."

issued or deposited not long before or after the ides of March. (See Table I, Appendix *infra.*) None of them were entered in the Tualatin Valley Nurseries Books and records[5] nor were they reported in the partnership return or in appellant's income tax return for 1947. (R. 635, 640-641, 645-646.)

When the return for 1947 was prepared, appellant asked accountant Lawrence Cook to put as a deduction an item of $10,000 paid in settlement of a suit for alienation of affections. Cook told appellant that such was not a business expense and that he would not enter it in appellant's return. That was the last return which appellant had Cook prepare. Thereafter appellant took his business elsewhere. (R. 26-30.)

On February 20, 1948, appellant and his wife sold some timber land to Coos-Pacific Timber Company, a wholly owned subsidiary of Dant and Russell, Inc. They had purchased the timberland in 1945 for $17,000. They sold it for $55,000. After taking $140 of certain costs into consideration, the gain amounted to $37,860. No part of this gain was reported on the partnership or joint return for 1948. (R. 332-336, 339-342, 705-706, 713; Ex. 42, 43.)

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[5] Except for $1,000 in currency (R. 542, 558), the Tualatin Valley Nurseries books and records for 1947 did not include any records of cash income. Shortly after he started to take care of the nursery records in the first part of 1946, Cook recommended that appellant maintain a cash record. Pursuant to this recommendation Cook set up a daily cash record consisting of duplicate slips. The system was not carried into effect. When Cook requested appellant to keep the cash record, appellant replied that he was a very busy man and did not have time to do it. (R. 39, 40, 55, 61, 63, 64.)

When the agents recomputed the Tualatin Valley Nurseries' net income for 1948, the gain from the sale was treated as earned at the time of the contract of sale on February 20, 1948. Fifty per cent of this or $18,930 was included as a capital gain. (R. 704-705.)

Pursuant to the contract of sale, Dant and Russell, Inc., made a series of installment payments by check. An itemization of these checks and their disposition may be seen in Table IV, Appendix, *infra.* A $27,592.98 check dated February 20, 1948, made payable to Leo Elwert was endorsed by Leo Elwert (R. 344) and was deposited to the Leo Elwert and Mary Elwert real estate account in the Tigard Branch of the United States Bank. Mearl Hammond prepared the partnership and joint returns for 1948 without audit (R. 317) and did not include this item. He was not informed of the real estate transaction or of this bank account until 1950. (R. 261, 265, 318-319, 324.)

On August 26, 1948, the Birds-Eye Division of General Foods Corporation issued a check made payable to Leo Elwert for $1,600. This was in payment of a lease of land. (R. 425-428.) On August 31, 1948, Dant and Russell, Inc., issued a check for $6,875, as an installment payment on the above mentioned purchase of timber land. (R. 343, 484.) Both of these checks were endorsed by Leo Elwert. Neither of these checks was run through any of appellant's bank accounts. Instead, he took them to Albert A. Asbahr, an attorney at law, who deposited them to his own account. Asbahr in turn issued his own checks to apply upon the pur-

chase of real estate in behalf of appellant. (R. 343, 344, 431, 485-486.)

During 1949, appellant established six new bank accounts. In addition to one collection account,[6] one checking account[7] and one savings account[8] each in his own name, he created three other bank accounts under the names of L. K. Schamburg,[9] L. C. Albee,[10] and L. K. Albee or G. M. Bloomquist.[11] When appellant created the L. C. Albee account on February 25, 1949, he endorsed and deposited a check in the sum of $7,287.50. (R. 343, 464.) This check represented a part of the capital gain from the sale of timberland to Coos-Pacific Timber Company. (See Table IV, Appendix, *infra.*) When appellant created the L. K. Albee or G. M. Bloomquist account on June 22, 1949, he endorsed and deposited a check in the sum of $11,334.88. (R. 466, 470, 683-684.) This check included a capital gain from the sale of timberland to Long-

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[6] Opened March 10, 1949, at the Main Branch, First National Bank. (R. 374-375, 383.)

[7] Opened March 12, 1949, at the Main Branch, First National Bank. (R. 389.)

[8] Account # 94767, opened July 29, 1949, at the Pacific First Federal Savings and Loan. (R. 476.)

[9] Account # 94299, opened January 27, 1949, at the Pacific First Federal Savings and Loan. (R. 477-478.)

[10] Account # 94380, opened February 25, 1949, at the Pacific First Federal Savings and Loan. (R. 463.)

[11] Account # 94638, opened June 22, 1949, at the Pacific First Federal Savings and Loan. (R. 463, 476-477.)

view Fiber Company.[12] Neither of these two capital gains was recorded on the books. (R. 677, 684.) None of the bank accounts mentioned were made known to the accountant who prepared the returns for 1949. (R. 318-319, 330.)

Two checks in the sum of $1,600 and $1,500 were issued by General Foods Corporation on August 24, 1949, and October 19, 1949, respectively. These were in payment for leases on two parcels of land. (R. 425, 429-431.) Neither of these checks was put through the Tigard or Sherwood banks nor was either check recorded on the partnership books. (R. 680-681.) The $1,600 check together with two other unrecorded checks in the sums of $453.39 and $779.97 representing sales of dried prunes and nuts, was cashed at the Pacific First Federal Savings and Loan Association. A cashier's check in the sum of $2,733.36 was issued to Leo Elwert in their place. (R. 443, 447, 471-472, 681-682, 683.)

Accountant Mearl Hammond prepared the partnership and individual returns for the year 1949. On or about March 12, 1950, he delivered them personally to appellant and his wife and told them that the returns would have to be signed at the bottom of the page. (R. 227-228, 287-291.) Appellant did not file a return of any sort for the year 1949. (R. 423-424.)

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[12] On June 24, 1948, Leo Elwert and Mary Elwert bought timber land for $8,000. On April 18, 1949, they sold it to Longview Fiber Company and received a check for $11,334.88 which was deposited as indicated above. After the deduction of a $2 filing fee, the capital gain amounted to 50% of $3,332.88 or $1,666.44. (R. 500-509, 683-684, 714-715.)

The returns for all three years were prepared on the cash basis of accounting. (R. 23, 237-238.) Appellant's accountants did not audit his books. In the preparation of the returns for all three years, appellant's accountants used the amount of deposits in the Sherwood and Tigard[13] banks as the ultimate basis for calculating gross receipts. (R. 18-19, 254, 266, 317.) Neither Lawrence Cook, who prepared the 1947 returns, nor Mearl Hammond, who prepared the returns for 1948 and 1949, were informed of any deposits to other accounts. Nor were they informed of any cash receipts. (R. 19, 30, 58, 59, 220-221.) Cook testified that it was a difficult matter to find out about appellant's financial transactions. (R. 49.)

The Investigation Period

In February, 1951, Deputy Collector William H. Menlow and Special Agent Harold Parsons went to see appellant. (R. 517-518, 622.) They asked to examine his books and records. He told them that his accountant Mearl Hammond had custody of his records and that by going to see him they could obtain whatever records might be required. That same day the agents went to see Hammond and obtained from him all the books, bank statements and cancelled checks for the years 1947, 1948 and 1949. (R. 518-519.)

Upon their return to the office the agents commenced to make a comparison of the records of income with the deposits shown in the bank statements and the records of expense with the cancelled checks. After

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[13] Tualatin Valley Nurseries account only.

several pages of income entries, a total figure was shown and the words "Deposited Sherwood" or "Deposited to Tigard Bank," the date, and the amount. The totals agreed with the deposits made to the bank accounts. (R. 522.) Later additional bank accounts were discovered in the Southeast Portland Branch of the First National Bank, the Bank of California in Portland, and the Pacific First Federal Savings and Loan Association in Portland. (R. 626.) The items deposited therein were found neither to have been recorded in the books and records nor to have cleared through the Tigard or Sherwood banks. The agents could not find any item which had been transferred from any of the above accounts to the Tigard or Sherwood banks. By contacting the makers of the checks the nature of each transaction was learned. (R. 520-524, 533-545, 549-558, 626-632.)

Except for a $1,000 currency deposit in 1947, no cash was deposited in any of the three years. (R. 542, 558, 615, 616.) Certain invoices from Progressive Printing Company were introduced by the defense as evidence of cash expenditures. (R. 759.) Other than those which were already taken as deductions (R. 615-616) no additional credit was given for any cash expenditures. William H. Menlow testified as follows (R. 615, 616):

> I did not take those items or those documents into consideration in the item of cash expenses, because no cash was included in gross receipts.
>
> * * *
>
> The taxpayers have not included any cash in the bank deposits which go to make up the gross

receipts. If the cash did not go in to make income, I could not see where the cash came to pay expenses.

The Trial

After all of the above matters were elicited in great detail, the deficiency was summarized by an expert. The qualifications of H. C. Mytinger were shown to be that he was employed as a technical adviser with the Appellate Division of the Internal Revenue Service in Portland, that his work involved the analysis of tax returns and tax obligations, that he was a certified public accountant in California, that he had been employed by Internal Revenue for almost twenty years and that prior to his employment with Internal Revenue he had engaged in accounting work. (R. 697-698.) Based upon the testimony elicited at the trial, Mytinger testified that Leo Elwert's net income and income tax was reported and corrected as follows (R. 703-716):

Net Income

Year		Reported	Corrected	Additional
1947		$27,793.94	$36,503.56	$ 8,709.62
1948	(Joint)	25,322.74	47,675.07	22,352.33
1949		- 0 -	4,879.12	4,879.12
		$53,116.68	$89,057.75	$35,941.07

Income Tax

Year		Reported	Corrected	Additional
1947		$10,670.63	$17,505.78	$ 6,835.15
1948	(Joint)	5,583.76	15,370.80	9,787.04
1949		- 0 -	657.08	657.08
		$16,254.39	$33,533.66	$17,279.27

As the principal defense appellant sought to show that some amounts of cash were disbursed to itinerant laborers and were not deducted on the returns. Although the defense claimed large amounts of cash so spent and not deducted on the returns, the defense was completely silent as to how the Tualatin Valley Nurseries acquired these sums of cash. Under cross-examination of appellant's witnesses some evidence on this subject was elicited. On Sundays there were numerous customers at the nursery, not a few of whom paid for purchases with currency. (R. 735, 745, 807.) All of these sales of nursery stock (R. 806) "had to go through the packing shed." When questioned as to who received the money, Francis Mendel, the field foreman, testified (R. 808): "The salesmen we had in the packing shed" and Elwert. The customers were not seen to be given receipts. (R. 808.) Mrs. Lillian Helvie, an office worker, testified that (R. 734) "there were lots of cash payments" from customers but there was (R. 735) "no monetary record except what we paid the salesman." She also testified as follows (R. 735):

> Q. But you don't know where the cash came from that Mr. Elwert was paying the itinerant workers with?
>
> A. Well, I know that a good deal of the cash was collected right there at the plant. I know that. I knew cash was being kept down in the packing sheds * * *.

Apart from the cash received directly from customers at the packing shed, currency was also received

through the mail. The mail was opened at the Elwert's house and the office workers did not see any of it until after it was opened. Mrs. Helvie testified that she had never seen any of the money records introduced by the defense and she did not have any idea how much money was taken in day by day. (R. 734-735, 738-740.)

SUMMARY OF ARGUMENT

1. The crime of willful attempt to evade and defeat taxes was fairly and correctly charged in the language of the statute. The language "specific intent to evade the tax" does not appear in the statute and is merely descriptive matter used not in indictments but in instructions to the jury. With regard to the third count, the means alleged are surplusage.

2. There was more than ample evidence to support the verdict. The deficiency was established by proof of specific items of unreported income. The jury resolved against appellant the issue as to whether alleged cash expenditures substantially affected the deficiency established. Willfulness was established by the use of many bank accounts, some in different names, and appellant's willful failure to supply his accountants with any information in regard thereto.

3. The charge to the jury was fair and complete.

ARGUMENT

I

EACH OF THE THREE COUNTS IN THE INDICTMENT FAIRLY AND CORRECTLY CHARGED APPELLANT WITH A CRIME AGAINST THE UNITED STATES

For lack of an allegation that he had a (R. 5) "specific intent to evade the tax" appellant moved to dismiss all three counts upon the ground that none of them stated an offense against the United States. As an additional ground he contended that the third count was barred by the statute of limitations. These same matters were raised subsequently by an objection to the introduction of evidence (R. 2-9), motions for judgment of acquittal (R. 844; Supp. R. 30-33, 38-41), and a motion for arrest of judgment. In each instance appellant's motion was denied. (R. 7, 9, 844; Supp. R. 6, 8, 34, 35, 50.) When denying the motion to dismiss each of the three counts, the trial judge pointed out to counsel how he was confusing the matter of pleading with the separate and distinct matter of instructions on willfulness (R. 7-8):

> It is my opinion, Mr. Bischoff, that your motions are not well taken. I think that the specific intent which is an element here relates to the definition of the word "Willfully," and that element is introduced and made applicable when the matter goes to the jury in connection with the instructions as to the meaning of the words as used in the statute and in outlining the elements necessary to be found.

In each of the three counts there is a charge substantially in the language of the statute that appellant (Supp. R. 1, 2, 3) "did willfully and knowingly attempt

to defeat and evade" his income taxes. The statute says nothing about a "specific intent to evade the tax." Clearly the latter allegation is unnecessary in income tax evasion cases, the language of the statute sufficiently informing the defendant of the precise offense with which he is charged so that he may prepare his defense and safeguarding him from a prosecution on the same offense. *Capone* v. *United States,* 56 F. 2d 927, 930 (C.A. 7th), certiorari denied, 286 U. S. 553; *Himmelfarb* v. *United States,* 175 F. 2d 924, 934 (C.A. 9th), certiorari denied, 338 U. S. 860; *Rose* v. *United States,* 128 F. 2d 622, 624 (C.A. 10th), certiorari denied, 317 U. S. 651; *United States* v. *Rosenblum,* 176 F. 2d 321, 324 (C.A. 7th), certiorari denied, 338 U. S. 893; *Tinkoff* v. *United States,* 86 F. 2d 868, 875 (C.A. 7th), certiorari denied, 301 U. S. 689; *Heasley* v. *United States,* 218 F. 2d 86 (C.A. 8th), certiorari denied, November 7, 1955. See generally, Rule 7 (c), Federal Rules of Criminal Procedure, *supra; United States* v. *Bickford,* 168 F. 2d 26, 27 (C.A. 9th); *Todorow* v. *United States,* 173 F. 2d 439, 447 (C.A. 9th).

The third count of the indictment (Supp. R. 3) alleged that appellant—

> *did willfully and knowingly attempt to evade and defeat the said income tax owing by him to the United States of America for the said calendar year 1949,* by failing to make such income tax return to the said Collector of Internal Revenue, or to any other proper officer of the United States of America, and by failing to pay to said Collector of Internal Revenue, or to any other proper officer of the United States of America, said income tax

> and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct gross and net income for said calendar year 1949 * * * (Emphasis supplied.)

Here again it may be noted in the portion underscored that appellant was charged substantially in the language of the felony statute. Section 145(b), *supra.* Completely ignoring the legal effect of the allegation underscored appellant argues that this count does no more than charge appellant with a misdemeanor (Section 145(a)), which is barred by the three year statute of limitations. This argument is predicated upon the false assumption that the specification of means is a necessary part of the indictment and constitutes the gist of the crime charged. All income tax evasion cases hold directly to the contrary.

The means by which tax evasion is attempted need not be specified in the indictment. In *Capone* v. *United States, supra,* it was said (p. 931):

> But it is contended by appellant that the indictment should have specified the means by which he attempted to evade or defeat the payment of the tax. Neither the *Cruikshank* Case nor any other case which we have been able to find supports this contention. In the *Cruikshank* Case it was stated that all rights are not guaranteed by the Federal Constitution, and that therefore, as a matter of law, a charge of conspiracy to defeat a citizen's constitutional right must show that the right threatened is one conferred by the Constitution. In other words, if a certain right is excepted in the definition of the crime, facts must be pleaded to avoid the exception.

> But in the instant case there are no exceptions, for the statute says that every attempt to evade or defeat the payment of income tax is a violation of law. What was a question of law in the *Cruikshank* Case, by reason of existing exceptions, is in the instant case a question of fact for the jury because of the absence of exceptions.

Including allegations regarding the means employed is a form of anticipatory pleading. It often obviates a bill of particulars.[14] In *Imholte* v. *United States* (C.A. 8th), decided November 1, 1955, (1955 C.C.H., Par. 9727) the court referred to Section 145(b) and said:

> The statute is drawn in broad general terms. The willful attempt to evade or defeat any tax in any manner is the offense defined. The offense may be committed in any manner so long as there is a willful attempt to evade the tax. It may or may not be committed by the filing of a false or fraudulent return coupled with conduct which brings it within § 145(b). See *United States* v. *Johnson,* 319 U. S. 503. Hence that part of the indictment which refers to the filing of a false and fraudulent return *is merely a specification of a definiteness and certainly for the defendant's information, in-*

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[14] In this case appellant was furnished with a bill of particulars as to each of the three counts. (Supp. R. 10-15.) Referring to the year 1949 and Count III, the bill of particulars stated (Supp. R. 14.):

> 5. Responding to item 5, defendant concealed or attempted to conceal the alleged adjusted gross income by the use of fictitious bank accounts, by failing to record income on the appropriate books and records, and by other means more peculiarly within the knowledge of the defendant.

> *corporated in the indictment originally rather than upon the subsequent order of the court in response to a motion for bill of particulars or to make more definite and certain.* (Emphasis supplied.)

Allegations as to the means employed may be treated as surplusage. In *Himmelfarb* v. *United States,* 175 F. 2d 924, 936, certiorari denied, 338 U. S. 860, this Court said:

> The fact that the indictment charged that a false and fraudulent income and victory tax return was filed, is not fatal error. The word "victory" was surplusage and unnecessary to the charge. *The real offense alleged was a willful attempt to evade and defeat a legal income tax.* (Emphasis supplied.)

To the same effect is *Heasley* v. *United States,* 218 F. 2d 86, 88-89 (C.A. 8th), certiorari denied, November 7, 1955, in which it was said:

> The sufficiency of the indictment is challenged because it included a charge that the defendant in his income tax returns willfully and knowingly understated the amount of his adjusted gross income, it being argued that the amount of taxes due from a taxpayer is not dependent upon the amount of his adjusted gross income but such tax is levied upon his net income.
>
> The indictment embodies the words of the statute and ordinarily an indictment for a statutory offense is sufficient where the charge is made in the words of the statute. *The defendant is charged with a willful and fraudulent attempt to defeat and evade a large part of his income tax by understating his adjusted gross income. The indictment*

would have been good had it not embodied the additional charge or information as to the manner in which the evasion was attempted.

* * *

We think this indictment clearly advised the defendant of the facts constituting the offense with which he was charged and a conviction or acquittal would be a bar to a further prosecution for the same offense. (Emphasis supplied.)

For cases affirming judgments of conviction in which the defendant was charged with a willful attempt to evade and defeat income taxes by willful failure to file an income tax return together with other means, see *United States* v. *Smith,* 206 F. 2d 905, 909 (C.A. 3d); *United States* v. *Kafes,* 214 F. 2d 887, 890 (C.A. 3d), certiorari denied, 348 U. S. 887; *Sens* v. *United States,* 212 F. 2d 795 (C.A. 6th), certiorari denied, 347 U. S. 1015.

II.

THERE WAS MORE THAN AMPLE EVIDENCE TO SUPPORT THE VERDICT

By referring to the statement of facts and to the tables (Appendix, *infra*) tracing the unreported partnership income from appellant's hands into various bank accounts, the means by which appellant sought to circumvent the income tax law is readily apparent. Appellant has challenged the sufficiency of the evidence in three ways. He contends as a matter of law that the evidence did not establish (1) any deficiency or (2) willfulness; (3) he also argues that the evidence admitted in proof of (1) and (2) are in fatal variance with the indictment. Although these matters are

argued at great length in his brief (Br. 13-89) they are without merit.

A. The Deficiency

Appellant does not dispute any of the additional partnership receipts established by the Government. Partnership receipts and capital gains amounting to $23,196.74 in 1947, $22,537.82 in 1948, and $9,231.81 in 1949 he admits were not reported on the partnership returns. (Br. Appendix, pp. 1, 3, 5.) However, he contends that unreported expenditures and losses offset the deficiencies established. The argument regarding unreported deductible expenditures is based largely upon testimony regarding cash payments to itinerant laborers. (Br. 20, 22, 33-41.) He also argues that he sustained an unreported deductible loss on a $22,000 loan to Denton Construction Company (Br. 47, 71) and that the unfiled partnership return for 1949 overstated his income in an amount from $19,000 to $20,000 (Br. 24, 32, 51, 66-67, 73).[15]

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[15] Other alleged expenditures and losses are cited by appellant. He claims other cash expenditures not reported. (Br. 43, 44, 46, 48, 51, 66, 71-72.) The Government's answer to the argument regarding cash expenditure for itinerant labor is applicable to all alleged cash expenditures including those made to Progressive Printing Company.

The choice of the standard deduction in preference to the state income tax deduction (App. Br. 22, 42) was irrevocable. See Sec. 23(aa)(3).

Although appellant has raised some question as to whether they were properly taken into consideration (App. Br. 43, 48, 51) the evidence shows that the following items were actually allowed in full:

Loss on sale of 99 W Motel	$540.00	R. 699-701
Loss on sale of army truck	550.00	R. 699-701

The argument is unsupported by the evidence or the law. With regard to the cash allegedly expended in the sum of $20,000 each year and not taken as deductions on the income tax returns, appellant does not explain where the cash came from. He does not contend that it was withdrawn from sources reported as income. Such cancelled checks drawn on the Tigard and Sherwood banks could easily have been put into evidence when cross-examining Cook and Hammond. He makes a weak effort (App. Br. 21, 34) to show that it came from the unreported income represented by the checks "cashed"[16] by Schmidt. These transactions were made by Schmidt only between February 27, 1947, and April 22, 1947. (See Table I, Appendix, *infra.*) Appellant does not explain what he did with the cash between

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Interest paid on 99 W. Motel	100.99	R. 704-705
Collection charges paid—1948	9.10	R. 704-705
Collection charges paid—1949	13.00	R. 714-715

Although there was no evidence outside of the partnership return to show that a note obligation in the sum of $3,000 had in fact been incurred by one Lester McConkey, or that if such a debt existed that it was a non-business debt, or to what extent it became worthless if at all, nevertheless the full amount of the $1,500 loss claimed on the return was allowed. (R. 721-723.)

With regard to the alleged loss from the capital stock of Producers Gas and Oil Company (App. Br. 47, 67) there was no evidence of the purchase price (R. 312), no schedule in the return showing the details of the alleged loss (R. 306), nor any evidence showing the amount of the alleged loss (R. 720-721). Nevertheless, the $1,000 loss claimed on the return was allowed in full. (R. 721.)

[16] Schmidt testified that except for one check he did not cash the checks. He simply deposited them and drew checks drawn on his own account. The latter were delivered to Elwert. (R. 165.)

April 22, 1947, and the times when he allegedly used it to pay the harvest hands for picking cherries in June (R. 752), nuts in August (R. 797), and prunes in September (R. 794), and for pruning nursery trees in November (R. 799). Elwert solicited Schmidt's services for the six-week period around March, 15, 1947, and April 15, 1947, when federal and state income taxes fell due. If there was any connection between Schmidt's accommodations at tax return time and Elwert's payments of the itinerant laborers in the summer and fall, the jury apparently did not give much credence to it. Nor has appellant offered any explanation as to the source of the alleged cash expenditures for 1948 or 1949.

There appears to be no direct evidence as to the source of the cash expended. There is circumstantial evidence that whatever cash may have been expended came from cash sales which were not reported as income. This may be inferred from the fact that many cash sales were made (R. 734, 735, 806, 808) and that no cash, except for $1,000 currency deposited in 1947, was put in the Tigard or Sherwood bank accounts or reported as income (R. 542, 558, 615, 616). If these cash sales be accepted as the logical source of the cash expenditures, and it is submitted that they are, then whatever cash expenditures there may have been are completely offset by the unreported cash income. This leaves unaffected the deficiency consisting of unreported income from the checks deposited in the various bank accounts.

Appellant argues (Br. 47, 71) that he suffered a loss of $22,000 on three notes (R. 495-496) which was not deducted on his return. The alleged notes were not introduced. Albert W. Denton, the borrower, was not called to testify. No explanation was given as to why the notes were not introduced or why Denton was not called to testify. The only evidence of this alleged loss consists of the testimony of Asbahr. When questioned as to the nature of the funds loaned, Asbahr testified (R. 498) "Some of it was checks and some of it was cash." Asbahr was questioned as to how he had notified Elwert of the alleged loss. He testified as follows (R. 498):

> By Mr. Luckey:
>
> Q. Mr. Asbahr, with reference to this Denton Construction Company matter, did you furnish Mr. Elwert with a letter regarding the worthlessness of that loan?
>
> A. I don't think so.
>
> Q. Do you recall whether or not in 1950 you might have written him such a letter?
>
> A. No, I wouldn't remember that now.

Upon the basis of such flimsy testimony, appellant argues (Br. 47, 52) that the established deficiency for the years 1948 and 1949 was offset. If for the purposes of the alleged loan any checks had in fact been drawn on residuaries of reported income it would have been simple enough to have introduced evidence in regard to them. Hammond had all records pertaining to the two known accounts at the Tigard and Sher-

wood banks. (R. 330.) He could readily have been cross-examined as to any checks drawn on these funds. From the fact that such evidence was not introduced it was reasonable for the jury to infer that no such checks were in fact drawn on reported income depositaries. If such a loan was made, it must have been made from sources of unreported income. Had it been withdrawn from any of the banks shown as residuaries of unreported income such could readily have been established. Although funds were allegedly advanced in the sums of $2,200 on February 21, 1948, $18,000 on February 24, 1948, and $2,000 on March 18, 1948, (R. 496) no withdrawals in these or any approximate amounts were shown to have occurred at or near any of these dates. Here again the argument leaves unaffected the deficiency established by the Government.

Appellant asserts (Br. 51, 66-67) that Hammond overstated receipts in the 1949 return, that upon re-examination of the books of account he discovered an overstatement of income between $19,000 and $20,000, and that he was unable to reconcile the returns with the records. Hammond's clarified testimony on redirect examination indicated that his knowledge of the alleged overstatement of gross receipts was not based on any re-examination of the books which he himself had conducted. Instead, the issue of any discrepancy was first called to his attention by the revenue agents. (R. 326.) But the amount of the alleged discrepancy was based upon hearsay remarks by one Mr. Eiseman. (R. 322-324.) Appellant did not call Mr. Eiseman to testify as to his findings. Except for this hearsay there is no

evidence to establish the amount of the alleged discrepancy. The jury was instructed (R. 856) "the first essential element is that there was owing to the Government of the United States by the defendant a substantial income tax for the taxable year of 1949." The jury resolved this issue against appellant.

In *Gendelman* v. *United States,* 191 F. 2d 993, 996, certiorari denied, 342 U. S. 909, this Court said:

> While the government had the duty to prove guilt beyond a reasonable doubt, it was not required to prove the exact amounts of unreported income. Skillful concealment can not be made an invincible barrier to proof. *United States* v. *Johnson,* 1943, 319 U. S. 503, 517, 63 S. Ct. 1233, 87 L. Ed. 1546. Proof of the amounts of the appellant's income need not measure up to the amount stated in the indictment. *Gleckman* v. *United States,* 8 Cir., 1935, 80 F. 2d 394, certiorari denied, 297 U. S. 709, 56 S. Ct. 501, 80 L. Ed. 996. What is necessary to take a case of this kind to the jury is a showing that a taxpayer had income which he deliberately failed to include in his return. *Schuerman* v. *United States, supra,* 174 F. 2d at page 399. Whether such a showing had been made at the close of the government's case was to a great extent dependent upon the credibility of the government's witnesses.

In *Canton* v. *United States* (C.A. 8th), decided October 20, 1955 (1955 P-H, par. 72,983), the Court of Appeals affirmed a judgment of conviction for income tax evasion. At the trial and upon appeal the defendant asserted certain expenditures as deductions although they had not been claimed on his income tax

return. The appellate court approved the ruling of the trial court. In sustaining the trial court's denial of the defendant's motion for judgment of acquittal the Court of Appeals said:

> *We agree with the trial court that the defendant was not entitled to these unclaimed deductions as a matter of law.* (Emphasis supplied.)

In *Clark* v. *United States,* 211 F. 2d 100, 103 (C.A. 8th), certiorari denied, 348 U. S. 911, the court said:

> The Government is not required to establish income-tax evasion by the same processes and formalities which a taxpayer is required to observe in making his return. The existence of unreported income may be demonstrated by any practical method of proof that is available on the circumstances of the particular situation. Cf. *Burka* v. *Commissioner* (4 Cir.), 179 F. 2d 483, 485. And it is not necessary, in order to make a case of tax evasion, that the exact amount of such income should be established. *United States* v. *Johnson,* 319 U. S. 503, 517, 63 S. Ct. 1233, 87 L. Ed. 1546. Nor is it incumbent upon the Government, in making a *prima facie* case of evasion to prove the non-existence of any other deductions than those which the taxpayer has claimed in his return. *United States* v. *Link* (3 Cir.), 202 F. 2d 592, 593, 594. If the taxpayer legally has other deductions than those which he has so claimed, it is his privilege to show them and explain them as part of his defense. * * * *It does not therefore destroy the Government's prima facie case as a matter of law that the defendant is able to develop on cross examination of the Government's witnesses that a right to other deductions may exist,*

or to establish by his own evidence that such deductions do in fact exist, and especially is this true where the unreported income pointed to by the Government's evidence is reasonably capable of being found to have exceeded the amount of the unclaimed deductions. (Emphasis supplied.)

To the same effect, see *Stayback* v. *United States,* 212 F. 2d 313 (C.A. 3d), certiorari denied, 348 U. S. 911; *Bender* v. *United States,* 218 F. 2d 869 (C.A. 7th), certiorari denied, 349 U. S. 920.

B. Willfulness

Appellant contends that there was no evidence indicating knowledge of the falsity of the returns for 1947 and 1948 or of the failure to file the 1949 return (Br. 13, 23-31); that there was no evidence of a willful attempt to evade and defeat the taxes (Br. 16, 52-74); and that the inaccuracies in the returns were due to incompetence of his accountants (Br. 14, 15, 21-22).

The argument is without merit. Appellant did not give receipts for cash which he received from customers to whom he made cash sales. He used the house and the shed rather than the office in which to handle cash. He did not have the office helper record the daily receipts. (R. 734-735, 738-740, 745, 806, 807, 808.) He did not keep a record of cash expenditures. (R. 38, 256.) Except for $1,000 in 1947, he did not deposit any cash to his bank accounts. (R. 542, 558, 615, 616.)

It is contended (Br. 20) that appellant was compelled to have in his possession large sums of cash in

order to pay itinerant farm labor. There is no reason why he could not have deposited cash sales receipts into a proper bank account and made appropriate lump sum withdrawals therefrom to pay the help. In this way, with his system of having the accountants rely upon the bank deposits and checks drawn thereon, he could have maintained an adequate record of both receipts and expenditures.

In *Maxfield* v. *United States,* 152 F. 2d 593, 597, certiorari denied, 327 U. S. 794, this Court said:

> We are asked to hold that there is no evidence of willful intent to evade the tax, it being claimed that the showing does not measure up to the standards set in *Spies* v. *United States,* 317 U. S. 492, 63 S. Ct. 364, 87 L. Ed. 418.
>
> * * * There is * * * competent evidence that they failed to maintain adequate records, the only books kept being a cash journal derived from check stubs, bank statements, and deposit slips. * * * large sums of money were not put through any bank account. * * *
>
> We are satisfied that the evidence of willful intent was sufficient to carry the case to the jury. The question of willfulness is one of fact, *Arnold* v. *United States,* 9 Cir., 75 F. 2d 144; and direct proof of wrongful intent is not necessary to establish guilt in cases of this character, *United States* v. *Commerford,* 2 Cir., 64 F. 2d 28; *Capone* v. *United States,* 7 Cir., 51 F. 2d 609. (Emphasis supplied.)

Appellant diverted income away from the bank accounts known to his accountants. He used a false ad-

dress and telephone number when establishing one new bank account. (R. 107, 179-180.) He avoided going to the bank himself. Instead he had his friend A. D. Schmidt do his banking for him at the Portland Branch of the Bank of California. While Schmidt did the banking Elwert waited one block away at the brokerage house. (R. 158-187.) He established several accounts in names other than his own, namely, L. K. Schamburg, L. C. Albee, and L. K. Albee or G. M. Bloomquist. He opened and closed bank accounts within short intervals. For example, the account at the Portland Branch of the Bank of California was opened on March 12, 1947, and closed on August 22, 1947. (R. 199, 204). His account in the Southeast Portland Branch of the First National Bank was opened on January 14, 1947, and closed on January 23, 1948. (R. 104, 111.) His account at the Citizens Branch of the United States National Bank was opened on February 1, 1947, and closed on January 13, 1948. (R. 348.) Six weeks, the shortest period of all, was the life of his checking account at the main office of the First National Bank. This account was opened on March 12, 1949, and closed on April 21, 1949. (R. 389.) He did not make any transfers between the two principal bank accounts at the Tigard and Sherwood banks and the other bank accounts. (R. 520-524, 533-545, 549-558, 626-632.) From his Tigard and Sherwood bank statements and checks it was therefore impossible for his accountants to detect any other bank accounts. All of these acts amount to attempts to conceal his assets. In *Remmer* v. *United States,* 205 F. 2d 277, 288, remanded on other grounds,

347 U. S. 227, reaffirmed, 222 F. 2d 720, certiorari granted on October 10, 1955, this Court said that willfulness could be inferred from "the concealment of the ownership of property."

Appellant furnished his accountants with bank statements and cancelled checks on the two principal accounts in the Tigard and Sherwood banks. (R. 18-19, 254.) But he did not furnish his accountants any information whatsoever on the other bank accounts. (R. 19, 317.) The accountants are said to have been incompetent. (Br. 14, 15.) In *Norwitt* v. *United States,* 195 F. 2d 127 (C.A. 9th), the appellant argued as here that there was no competent evidence of willfulness. In that case, as well as in this case, financial information was withheld from the bookkeepers. This Court said (p. 132):

> It is hornbook law that the Government need not adduce direct proof of intent. It may be inferred from the defendant's acts. This principle has been repeatedly applied in income tax cases.
>
> * * *
>
> * * * *Norwitt was not entitled to rely on the income computed by his accountant when he withheld from him the information whence that income could have been correctly determined.* (Emphasis supplied.)

To the same effect, see *Bateman* v. *United States,* 212 F. 2d 61, 68, where this Court said that the accountant, "however competent, could not report income of which he had no knowledge."

Appellant demanded that Cook take a deduction on his income tax return for the amount paid in settlement of a suit for alienation of affections. When Cook refused to take this non-business deduction, appellant took his business elsewhere. (R. 27-28, 30.) His demanding a deduction to which he clearly was not entitled and then terminating the accountant's services upon the latter's refusal to comply with his wishes could be construed as an attempt to evade taxes and to remove anyone who stood in his way. Despite this evidence appellant argues (Br. 61) that he did not take deductions to which he was entitled and that this shows that he did not have any predisposition to evade taxes. This argument does not ring true. It is quite possible that cash disbursements were not revealed to the accountants for fear that it might entail disclosure of cash sales in larger amounts. Also, as was said in *Clark* v. *United States,* 211 F. 2d 100, 103 (C.A. 8th), certiorari denied, 348 U. S. 911:

> Some times the failure to claim deductions in a return may well be a part of the taxpayer's scheme to cover up his unreported income as a matter of not creating suspicion on the face of his return. * * * In any event, the attempt to establish unclaimed deductions as a defense against fraud in misstating income will ordinarily of itself present merely a question of fact, first as to the existence and amount of such deductions, and further, as suggested above, as a possible ingredient in the taxpayer's intent to conceal his unreported income by partially neutralizing the face of his returns.

Inasmuch as he did not prepare or sign the partnership return for 1947, appellant argues (Br. 24-25) that there is no evidence that he had knowledge of its contents or its falsity. This argument overlooks the evidence concerning Leo Elwert's part in the non-rendition of data which should have gone into the 1947 partnership return. Cook had spoken to Leo Elwert many times about the necessity of keeping records in order to show a correct financial picture. Some of these conversations are mentioned in appellant's brief. (Br. 33, 62-64.) After Cook had accumulated all the information that he could from the bank statements and before the partnership or individual returns were prepared, Cook usually consulted Leo Elwert regarding his financial transactions during the year and asked (R. 48): "Now what else? What other transactions have you had for the year?" Despite these efforts on the part of the accountant, substantial omissions of income were made on the 1947 partnership return. When appellant signed[17] his individual return for 1947, he must have known that it was false. This he must have known from the fact that he had kept away from Cook all information regarding his having made deposits to the Southeast Portland Branch of the First National Bank and to the Portland Branch of the Bank of California in the total amount of $23,196.74. (R. 19; see Table I, Appendix, *infra.*) This sum is too large to have been an oversight. And he must have

[17] His return for 1947 bears what purports to be his signature. (Ex. 1; R. 12.) This signature constituted *prima facie* evidence that the individual return was actually signed by him. No evidence was introduced to rebut this presumption.

known that on his individual return his distributive share of the partnership income did not reflect any part of this amount.

It is asserted (Br. 15, 29-30) that the Government's evidence establishes that (1) Hammond prepared the returns for the year 1949, (2) that he did not deliver them to appellant for signature and filing, and (3) that Hammond retained possession of the returns until they were found in his possession by the Internal Revenue Agents. Of these three statements only the first is completely supported by the evidence. (R. 225.) The second statement is directly contrary to Hammond's uncontradicted testimony which was as follows (R. 227, 228):

> Mr. Luckey: Q. Now, what did you do with those returns after you had prepared them?
>
> A. I delivered them to the nursery myself in person. Possibly the reason for delivering up there in person, at that time, as I recall, it was about March 12th, and we were pretty close to the deadline. Otherwise I might have mailed them.
>
> Q. Who was present when you delivered them?
>
> A. Leo and Mary Elwert.
>
> * * *
>
> Mr. Mead: Did you deliver these to Mr. and Mrs. Elwert at the home there or at the office?
>
> A. Yes, at home.
>
> Mr. Mead: What time of day was it?
>
> A. It was in the evening about 8:00 or 8:15, as I recall.

As to the third statement, while it is true that the returns were found in Hammond's possession (R. 577), it could not be true that they were in Hammond's possession during the time that the returns were in the Elwert's possession.[18]

Simply because the prepared tax returns for 1949 showed no tax liability, it is argued (Br. 15) that the failure to file the return could not have been done with intent to evade the tax. This is a non-sequitur. As compared with the previous year's showing of substantial income, to file a non-taxable return in 1949, he might have feared, would arouse suspicion and invite investigation. If such were his thoughts he might have considered inactivity and silence the most likely way of evading detection.

Appellant has argued that other matters prompted his acts of concealment. He says for example (Br. 59) that the carrying of the various bank accounts was prompted by the difficulties that stemmed from the suit for alienation of affections. It is difficult to see how there can be any connection between the suit for

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[18] Between March 12, 1950, when the returns were first delivered to the Elwerts and February, 1951, when the Internal Revenue Agents obtained the records from Hammond, Hammond had come into possession of the returns in some way. The record is silent as to how the returns got from the Elwerts to Hammond. The Elwerts' home was near the office. In the office there was a large box of records which Hammond came to pick up from time to time. (R. 257.) Elwert could very easily have taken the returns from the house to the office and left them in the large box of records. The next time that Hammond picked up the box of records he would have taken the returns too. This is a far cry from saying that the returns were never delivered to the Elwerts.

alienation of affections which was settled on March 14, 1947 (R. 156), and the establishment of six new bank accounts in 1949 (Statement of facts, *supra*). Even if other difficulties did prompt some of his highly evasive activities, this would not absolve him of criminal responsibility for tax evasion. In *Spies* v. *United States,* 317 U. S. 492, 499, the Supreme Court said:

> *If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.*
>
> In this case there are several items of evidence apart from the default in filing the return and paying the tax which the Government claims will support an inference of willful attempt to evade or defeat the tax. These go to establish that petitioner insisted that certain income be paid to him in cash, transferred it to his own bank by armored car, deposited it, not in his own name but in the name of others of his family, and kept inadequate and misleading records. *Petitioner claims other motives animated him in these matters. We intimate no opinion. Such inferences are for the jury.* If on proper submission the jury found these acts, taken together with willful failure to file a return and willful failure to pay the tax, to constitute a willful attempt to defeat and evade tax, we would consider conviction of a felony sustainable. (Emphasis supplied.)

C. The Variance

On March 15, 1948, Leo Elwert filed an individual ax return for the year 1947 in which he reported ne-half of the reported partnership income. (Ex. 1,

2; R. 12, 22.) On May 9, 1949, Leo Elwert and Mary Elwert filed a joint return for the year 1948. (Ex. 42; R. 212-214.) For the year 1949, Leo Elwert did not file a return of any kind. (R. 423-424.) On November 20, 1953, the indictment was filed charging appellant in each count with a willful attempt to evade his income taxes. (Supp. R. 1-4.) Without opposing appellant's written motions for bills of particulars, the Government supplied bills of particulars which set out certain unreported gross income items. The bill of particulars relating to 1947 and 1948 was filed on December 28, 1953. This did not specify whether these items of unreported income were those of the partnership or those attributable to appellant individually. (Supp. R. 10-12.) The bill of particulars relating to 1949 was filed on January 22, 1954. This referred to "the concealed gross income of the defendant." (Supp. R. 13.) The indictment and bills of particulars showed unreported income in varying amounts. The figures[19] are as follows (Supp. R. 1-3, 10-15):

Unreported Income

Year	Indictment	Bill of Particulars
1947	$12,028.92	$24,057.84
1948	21,716.48	23,477.08
1949	9,007.81	9,610.10

[19] The figures shown under the column entitled "Indictment" were obtained by subtracting the alleged reported income from the alleged corrected income. The figures shown under the column entitled "Bill of Particulars" were obtained simply by adding for each year the itemized amounts shown.

Although the figures were in obvious disagreement appellant did not request a supplemental bill of particulars. At the trial appellant objected to the introduction of any evidence concerning unreported partnership income. (R. 12-14, 20-21.) Although the trial judge asked for some authority in support of appellant's objection (R. 76) no case in point was produced the following morning of the trial (R. 79-80). Appellant contends (Br. 74-82) that the trial court erred by admitting the evidence.

The argument is one of form rather than substance. It is conceded that it would have been better form had the bills of particulars for the years 1947 and 1949[20] specified that the items represented unreported income of the partnership and that appellant's unreported income consisted of his distributable share which was one-half thereof. But appellant has not shown how he was injured. He did not claim surprise or request a continuance. He has not shown how he was mislead in any way.

On the face of the record on December 28, 1953, he had good reason to believe that the items shown in the first bill of particulars represented additional income to the partnership. This should have been apparent to him even though not so designated. For the year 1947, he was charged with a willful attempt to evade a tax on unreported income (Supp. R. 1-2) which amounted

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[20] For the year 1948, there was no variance of any consequence. The amounts shown as unreported income in the indictment and bill of particulars were in substantial accord with one another (Cf., *supra*, p. 40) and with the figures established at the trial (*supra*, p. 15).

to exactly one-half of the items shown in the bill of particulars (Supp. R. 10-11). The ratio was the same as his distributable share to the total of the partnership income. (Ex. 1, 2; R. 12, 22.) It is difficult to see how he could possibly have been misled as to the portion applicable to him or in any other way.

In *Goldbaum* v. *United States,* 204 F. 2d 74, 78, remanded, 348 U. S. 905, reaffirmed, 222 F. 2d 360, this Court said:

> In considering the question of variance, we bear in mind what was stated in *Berger* v. *United States,* 295 U. S. 78, 82, 55 S. Ct. 629, 630, 79 L. Ed. 1314, as follows: "The true inquiry, therefore, is *not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused.* The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." (Emphasis supplied.)

In *United States* v. *Rosenblum,* 176 F. 2d 321 (C.A. 7th), certiorari denied, 338 U.S. 893, it was argued that there was a variance between the use of the word "dividends" alleged as income upon which the tax was evaded, and the proof of receipt of over-ceiling prices from the sale of whiskey. The court said (p. 324):

We cannot accede to this contention. We state our reasons briefly. A variance is not regarded as material unless it is of such a substantive character as to mislead the accused in preparing his defense or place him in second jeopardy for the same offense. * * * [citing cases] In the state of this record, there can be no question as to each defendant being protected against another prosecution for the same offense, and it is clear that he was not surprised in any way by the character of the evidence to be adduced. Here, the gravamen or the essential ingredient of the charge was the willful attempt to evade and defeat the tax. The statute says that every attempt to evade or defeat the payment of income tax is a violation of the law. It is sufficient to charge a defendant with acts coming within the statutory description in the substantial words of the statute. * * * [citing cases] In our case, the character of the offense with which each defendant was charged, was not changed by the use of the word "dividends." The indictment set forth the facts which made up the charge against each. He was still charged with a willful attempt to evade and defeat the payment of his income tax. * * * [citing cases] *Hence, that part of the indictment which gave the breakdown of the gross income and allowable deductions was surplusage or a mere defect or imperfection in form which did not tend to the prejudice of each defendant, and as such, need not be proved.* (Emphasis supplied.)

Accord: *Himmelfarb* v. *United States,* 175 F. 2d 924, 936 (C.A. 9th), certiorari denied, 338 U. S. 860 (failure of proof as to alleged "victory" tax return held to be an immaterial variance); *Barcott* v. *United States,*

169 F. 2d 929, 932 (C.A. 9th), certiorari denied, 336 U. S. 912 (contention of a variance between restaurant business alleged to be source of income and proof regarding a record of safety deposit entries, held to be without merit); *Burke* v. *United States,* 58 F. 2d 739, 741 (C. A. 9th) (victim bank known by two names may be alleged as either).

With regard to the year 1949 the indictment and bill of particulars charged appellant with willfully evading a tax on an amount (Supp. R. 3) twice as much as that established at the trial (*supra,* p. 15). It is submitted that the variance in amount was not material. In *Goldbaum* v. *United States,* 204 F. 2d 74, remanded, 348 U. S. 905, reaffirmed, 222 F. 2d 360, this Court said (p. 78):

> The evidence relating to the gambling syndicate would disclose that total income was greater than this amount [reported income] by at least $29,060.75. This would fall far short of the allegation of $3,658,469.75, but so far as the indictment itself is concerned, this falling short of the proof of the larger cannot be said to constitute a variance either material or prejudicial.

Accord: *Gendelman* v. *United States,* 191 F. 2d 993, 996 (C.A. 9th), certiorari denied, 342 U. S. 909; *Maxfield* v. *United States,* 152 F. 2d 593, 597 (C.A. 9th), certiorari denied, 327 U. S. 794.

The cases cited by appellant may be distinguished or are inapplicable, In *Hartman* v. *United States,* 215 F. 2d 386 (C.A. 8th), the defendant was charged with failing to include in taxable income funds transferred

from his wholly owned corporation and deposited in his individual account. The trial court permitted evidence of his organizing and carrying on a family partnership which increased the number of taxpayers in respect to Government war contract profits. Obviously there was no relation between the two. The latter should have been excluded as irrelevant and prejudicial. In *Epstein* v. *United States,* 174 F. 2d 754 (C.A. 6th), a mail fraud case, there was a failure to prove any active fraud, an essential ingredient to the crime charged. *Levin* v. *United States,* 5 F. 2d 598 (C.A. 9th), does not involve any variance problem. In *United States* v. *Neff,* 212 F. 2d 297 (C.A. 3d), a second supplemental bill of particulars was filed on the day after the trial commenced. The defendant was taken by surprise and asked for a ten day continuance which was denied. This of course breached the rule that (p. 310) " 'The purpose of a bill of particulars is to enable the accused to avoid surprise, and to enable him to prepare for trial.' "[21] In *Bryan* v. *United States,* 175 F. 2d 223 (C.A. 5th), a net worth and expenditures case, there was a failure to negate the probability of prior accumulated funds. Of course the failure to prove the deficiency was fatal. In the case at bar there was no effort by the prosecution to bring in evidence of any crime than the one charged for each of three years. In proving appellant's distributive share of the unreported partnership income there is nothing unrelated or prejudicial in first proving

[21] Quoting from *Hughes* v. *United States,* 114 F. 2d 285, 288 (C. A. 6th).

the unreported partnership income. That was essential.

Appellant has cited (Br. 82-89) *Holland* v. *United States,* 348 U. S. 121 and other cases involving indirect proof. These cases are inapplicable to the case at bar which involved direct proof of tax evasion by specific items of unreported income.

In *Papadakis* v. *United States,* 208 F. 2d 945, 948, this Court said:

> In determining whether the evidence was sufficient to sustain the verdict we view the record in the light most favorable to the government and affirm if the evidence, so viewed, was sufficient to justify the jury in finding, beyond a reasonable doubt, that there has been a willful attempt to evade taxes. *Gendelman* v. *United States,* 9 Cir., 191 F. 2d 993, 995, certiorari denied, 342 U. S. 909, 72 S. Ct. 302, 96 L. Ed. 680; *McFee* v. *United States,* 9 Cir., 206 F. 2d 872, 874.

To this same effect are *Schino* v. *United States,* 209 F. 2d 67, 72 (C.A. 9th), certiorari denied, 347 U. S. 937; *Remmer* v. *United States, supra,* 205 F. 2d 277, 286, remanded on other grounds, 347 U. S. 227, reaffirmed 222 F. 2d 720, certiorari granted on October 10, 1955. Taking the evidence in the light most favorable to the Government there was more than ample evidence to support the verdict.

III

THE TRIAL COURT'S INSTRUCTIONS DEFINING WHAT CONSTITUTES A WILLFUL ATTEMPT TO EVADE AND DEFEAT TAXES, TAKEN AS A WHOLE, WERE FAIR AND COMPLETE

A. In General

Appellant argues (Br. 104-106, 109-110) that the court failed to define the elements of the crime. In particular it is contended (Br. 106-107 that the court erred in failing to instruct the jury that appellant was not charged with filing a false partnership return, and (Br. 109-110) that he did not have the burden of proving his innocence.

The argument is without merit. A reading of the introductory remarks by the trial judge[22] will show

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[22] The court charged the jury as to the elements of the crime as follows (R. 854-857):

Now the essential elements of the offense charged in Count 1 are: First, that there was owing to the Government of the United States substantially more income tax than was shown in the return of the defendant for the taxable year 1947.

Second, that the defendant knew there was owing substantially more income tax than that shown in said income tax return.

Third, that the defendant willfully attempted to defeat or evade part of such tax by filing or causing to be filed a false return knowing said return to be false.

Now, the essential elements are the same with respect to the offense charged in Count 2 of the indictment except that the taxable year there involved is the calendar year 1948.

When you come to consider Count 3 of the indictment you will find, as I indicated before, that it varies and is different from the other two. I instruct you that the essential elements of the offense charged in Count 3, as I have stated, are different, and principally they are different because the tax evasion charged against the defendant in Count 3 of the indictment allegedly resulted by virtue of his failing to make an income tax return rather than filing a false one. That is the allegation in the first two counts. In the third count the evasion allegedly results from his failing to file

that he instructed the jurors that there must be a substantial tax due, that such must be known, and that there must be a willful attempt to evade the tax. The judge also instructed the jury that the partnership

an income tax return, and not only by failing to file but, in addition, by concealing and attempting to conceal his true and correct gross income and net income and likewise the tax. The essential elements of the offense charged in Count 3, therefore, are different, and I will name them for you:

The first essential element that you must find beyond a reasonable doubt as to the third count—and all these elements must be found beyond a reasonable doubt before the defendant can be found guilty of the third count—the first essential element is that there was owing to the Government of the United States by the defendant a substantial income tax for the taxable year of 1949.

Second, that the defendant knew that he owed to the Government of the United States a substantial income tax for the taxable year of 1949.

Third, that the defendant knew that he was required by law to make an income tax return on or before March 15th, 1950, to the Collector of Internal Revenue at Portland, Oregon, for the taxable year of 1949.

Fourth, that he willfully and knowingly failed to file a return and to pay said tax.

Fifth, that the failure to file such income tax return and to pay said tax was with the specific intent to evade the payment of said tax; that is to say, that he intentionally and deliberately refrained from filing the return and paying the tax for the purpose of cheating and defrauding the Government of revenue legally due to the Government.

Lastly—this is as to the third count—and in addition thereto, the defendant concealed and attempted to conceal from the United States his true and correct gross and net income for that tax year.

As I have already stated to you, the burden is upon the plaintiff, that is the Government, to prove each and every one of the essential elements which constitute the offense under each of the three counts of the indictment beyond a reasonable doubt. If you entertain a reasonable doubt as to any one of the elements necessary to constitute the offense charged as to any one of the counts of the indictment, your verdict must be for the defendant as to any count as to which you find there is a reasonable doubt.

income is not subject to tax and that the partners pay income tax in their individual capacities. (R. 864). In view of the court's repeated instruction that there must be owing substantially more income tax than reported, the jurors could only have understood that the crime charged was that of tax evasion. The instructions given as to the burden of proof were clear.[23]

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[23] See last paragraph to preceding fn.

In other parts of the instructions, the court charged the jury as follows (R. 848-849, 867):

> * * * the law presumes every defendant to be innocent until he is proven guilty by the evidence beyond a reasonable doubt. And this presumption is not a mere matter of form, but is a substantial right of every defendant, and this presumption continues throughout the entire trial and until such time as you have found it has been overcome by the evidence beyond a reasonable doubt.
>
> Thus, a defendant, although accused, begins the trial with no evidence against him. The law permits nothing but legal evidence presented before the jury to be considered in support of a charge against him. The presumption of innocence alone is sufficient to acquit a defendant unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.
>
> I have used this term "reasonable doubt." A reasonable doubt is a doubt based upon reason and common sense and arising from the state of the evidence. A reasonable doubt exists in any case when, after a careful and impartial consideration of all the evidence, the jurors do not feel convinced to a moral certainty that a defendant is guilty as charged. A reasonable doubt may arise not only from the evidence produced but also from the lack of evidence. Since the burden is upon the Government, the prosecution or plaintiff, to prove the accused guilty beyond a reasonable doubt of every essential element of the offense charged, a defendant has the right to rely upon the failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross examination of a witness for the Government. The law does

Appellant contends that the court inadequately instructed the jury on the legal effect of deductible expenses (R. 113-114, 116) and on his individual tax liability (R. 110-111).

The argument is without merit. The judge instructed the jury that net income was the difference between gross income and the deductions allowed by law. (R. 864-865.) This is in accordance with the statutory law. Section 21(a), Internal Revenue Code of 1939. A reading of the court's instructions on the interrelation between partnership and individual income[24] is a fair

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not impose upon a defendant the duty of producing any evidence.

* * *

You are instructed that the defendant is not required to take the stand and to give testimony, and if the defendant does not take the stand and testify you are not to draw any adverse inference from that fact.

[24] The trial court's instructions regarding a partner's distributable share of partnership net income and the necessity that such share be reported on his own individual income tax return are as follows (R. 863-864):

You are instructed that where an individual taxpayer is a member of a partnership, income received by the partnership as the result of the partnership business does not in and of itself become income of an individual partner. For example, if the partnership received $100 in payment for merchandise sold by the partnership, neither the $100 nor any part thereof nor the profit involved therein, if any there should be, or any part thereof, would constitute either gross or net income to the individual partner. The individual partner is only chargeable with his distributive share of the net profits of the partnership determined from the operation of the partnership business for the entire taxable year. If the partnership has realized a net profit at the end of the tax year an individual partner is chargeable with his distributive share of the partnership net income; that is, it is that part of the partnership net

statement of the law. Sections 181-183, Internal Revenue Code of 1939.

B. Willfulness

There was much testimony regarding appellant's willful failure to keep records. Those portions of the testimony referring to appellant's failure to keep records of cash expenditures are set out in his brief. (Br. 62-64, 66-67, 92.) Appellant's willful failure to keep records of receipts was proved in much greater detail. This consisted largely of the proof of many checks representing nursery sales which were not entered in the records of the partnership nor deposited in the banks from whose records the partnership income was determined and reported. (See Statement of facts, *supra,* pp. 7-13.)

The Tualatin Valley Nurseries' income did not arise solely from selling nursery stock and fruits. In fact

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income which then becomes the gross income of the individual partner.

When the individual partner makes his income tax return, he must include as a part of his gross income his distributive share of the partnership income, to which he must add any individual income that he may have earned during the tax year. The total of these items constitute his gross income, and the difference between that amount and the total of his own deductions and exemptions allowed by law becomes then the individual taxpayer's taxable income upon which the income tax liability must be computed and paid.

You are instructed that partnerships as such are required by law to file partnership income tax returns, regardless of the amount of its net income, but the partnership itself is not subject to and is not required to pay any income tax. The partners only are required to pay income tax in their individual capacities upon the partners' distributive share of the partnership income.

none of the $22,462.42 unreported income for 1948 came from such sources. Instead it was composed of a capital gain from the sale of timber land to Coos-Pacific Timber Company, interest on a savings account at Pacific First Federal Savings and Loan, a lease of land to the Birds-Eye Division of General Foods Corporation, interest payment by Dant and Russell, Inc., on an installment payment contract, and interest payments by E. Miles Maxwell on another installment payment contract. (See Table II, Appendix, *infra,* p. 67.) In 1949, additional interest payments were received from Dant and Russell, Inc., and E. Miles Maxwell on their respective installment payment contracts, additional rental payments were received from Birds-Eye Division of General Foods Corporation, and more interest was earned on the Pacific First Federal Savings and Loan account. Also a capital gain was realized in the sale of timber land to Longview Fiber Company. None of this income was reported. (See Table III, Appendix, *infra,* p. 68.) The circumventive and exclusive tactics used to direct this income away from the usual records have already been shown. (*Supra,* pp. 7-13.)

The trial judge instructed the jury as follows (R. 857, 859):

> To constitute concealment or an attempt to conceal the Government must establish beyond a reasonable doubt that the defendant committed *some affirmative act for the purpose of concealing his true net income and tax liability* in addition to the failure to file the return, and *that it was with*

the specific intent to evade a tax liability legally due.

* * *

Every person subject to income tax, except persons whose gross income consists solely of salaries or wages for personal services, or arise solely from farming, is required to keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any income tax return.

With respect to the offenses charged in this case, *proof of specific intent is required,* before there can be a conviction. Now "specific intent," as the term suggests, means more than a mere general intent to commit the act. *A person who knowingly does an act which the law forbids, or who knowingly fails to do an act which the law requires, and purposely intending to violate the law, acts with specific intent.*

To state the matter in other words, *the intent required* under the statute here involved is not inherent in the act itself, but *must be established beyond a reasonable doubt by the evidence other than the act of the filing of a return that is false or the failure to file a return.* (Emphasis supplied.)

As though "handling of one's affairs to avoid making the records usual in transactions of the kind" (*Spies v. United States,* 317 U. S. 492, 499) was a matter foreign to tax evasion, appellant argues (Br. 90-94) that the judge erred in his remarks regarding the duty to keep records. It is thus contended that he was not

charged with willful failure to keep records and that even if this be a part of the prosecution's case the court erred in not making it clear that the failure to keep records must be willful. It is also contended (Br. 117-119) that the court erred in not telling the jury that incomplete records maintained through carelessness would not constitute tax evasion.

The Supreme Court has expressed a view that the matter of keeping records is very pertinent in a tax evasion case. In *Spies* v. *United States,* 317 U.S. 492, 496, 499-450, the Supreme Court said:

> * * * the willful failure to make a return, *keep records,* or supply information when required, is made a misdemeanor, without regard to existence of a tax liability. § 145(a). Punctuality is important to the fiscal system and these are sanctions to assure punctual as well as faithful performance of these duties. * * *
>
> * * * Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.
>
> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished *"in any manner"*. By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double

set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, *handling of one's affairs to avoid making the records usual in transactions of the kind,* and any conduct, the likely effect of which would be to mislead or to conceal.

In this case there are several items of evidence apart from the default in filing the return and paying the tax which the Government claims will support an inference of willful attempt to evade or defeat the tax. These go to establish that petitioner insisted that certain income be paid to him in cash, transferred it to his own bank by armored car, deposited it, not in his own name but in the names of others of his family, and *kept inadequate and misleading records.* * * * If on proper submission the jury found these acts, taken together with willful failure to file a return and willful faiure to pay the tax, to constitute a willful attempt to defeat and evade tax, we would consider conviction of a felony sustainable. (Emphasis supplied.)

The Court of Appeals for the Eighth Circuit has taken a similar view in tax evasion cases. In *Myres* v. *United States,* 174 F. 2d 329, 337, it held that willful failure to produce records was evidence of a willful attempt to evade taxes.

Nor are farmers "exempt" from keeping records as appellant contends. (Br. 93.) In *Hendricks* v. *Commissioner,* decided August 10, 1949 (1949 P-H T. C. Memorandum Decisions, par. 49,190), the court said:

Petitioner relies heavily upon section 29.54-1 of Regulations 111. That regulation obviously

> merely releases the farmer from the obligation of maintaining customary account books, including inventories, etc., such as would be maintained by a taxpayer engaged in manufacturing or trade. However, the regulations pertaining to income of farmers obviously requires that reasonably accurate accounts shall be kept. Section 29.22(a)-7 provides that the farmer in making his reports shall include the amount in cash or value of all sales of livestock and produce, the profits therefrom, and the gross income from all other sources. It specifies that the profits shall be determined by deducting the cost price from the sale price, less depreciation under certain circumstances. Section 29.41-1 provides that if the farmer's method of "accounting" clearly reflects his income, it is to be followed but that if that method of accounting does not reflect the income, the Commissioner shall prescribe the method of accounting to be used. The regulations do not relieve the farmer, when his income tax return is examined and adjustments recommended, from furnishing sufficient data to enable the Commissioner and the Tax Court to determine the taxpayer's taxable income with reasonably certainty.

If the farmers were exempt from keeping records it would be tantamount to saying that they did not have to pay income tax on their correct income. Furthermore, appellant's income did not arise solely from farming. Clearly he was obliged to keep some sort of record which reflected his income with reasonable certainty. The trial court's instruction was most appropriate under the facts of this case.

Appellant complains (Br. 94-103) of instructions that everyone is held to know the law and one cannot escape the responsibility of good faith. He cites *Morissette* v. *United States,* 342 U. S. 246; *Direct Sales Co.* v. *United States,* 319 U. S. 703; *Hargrove* v. *United States,* 67 F. 2d 820 (C.A. 5th); *Bloch* v. *United States,* 221 F. 2d 786 (C.A. 9th); *Wardlaw* v. *United States,* 203 F. 2d 884 (C.A. 5th); *Hartman* v. *United States,* 215 F. 2d 386 (C.A. 8th); *Berkovitz* v. *United States,* 213 F. 2d 468 (C.A. 5th); *Bentall* v. *United States,* 262 Fed. 744 (C.A. 8th); and *Lurding* v. *United States,* 179 F. 2d 419 (C.A. 6th). These cases may be distinguished.

The trial courts in *Morissette, supra, Hargrove, supra, Wardlaw, supra,* and *Bentall, supra,* virtually took the issue of intent or willfulness completely away from the jury. Evidence of carelessness in *Bloch, supra,* and lack of ordinary diligence in *Hartman, supra,* were said by the trial judges to constitute willfulness, each gross understatements. In *Lurding, supra,* the trial judge stated that it was immaterial whether the tax return was made out by someone other than the taxpayer. In *Berkovitz, supra,* 213 F. 2d, 474, the instruction on presumptive intent was held reversible error for want of the trial judge's "telling it [the jury] that the evidence offered by the accused to show good faith had to be taken into consideration." In *Direct Sales, supra,* the judgment of conviction was affirmed; thus, the holding of the court lends no support to appellant's argument.

In the case at bar a reading of the instructions as a whole will show that the trial judge put (R. 860)

"the issue as to intent" to the jury in such terms that it must have been clear that the issue was one of fact, not of law, and that they should consider (R. 860-861) "all facts and circumstances in evidence which may aid the determination of the state of mind." Directly contrary to what was done by the trial courts in *Bloch, supra,* and *Hartman, supra,* the trial court in the case at bar instructed the jury (R. 862-863):

> * * * negligence, carelessness or mistake of a taxpayer in the handling of his accounts or in providing information to be used in preparing an income tax return, or in handling business affairs, is not in itself equivalent to the concealment of income or fraud with intent to evade tax.

Instead of making the fatal deletion as in *Lurding, supra,* or the fatal omission as in *Berkovitz, supra,* the trial judge in the case at bar gave an instruction that before they could bring in a verdict of guilty they must find that the errors made were not merely the result of mistakes of fact or law but were due to the bad faith of Leo Elwert. The trial judge said (R. 862):

> Good faith on the part of a defendant is a complete defense to the charges set forth in the indictment. Thus, bona fide mistakes made in preparing or filing or failing to file a tax return are not to be considered by you as false or fraudulent statements or concealment of income within the scope of the charge made in the indictment, because willful tax evasion requires an intentional affirmative act as compared to an accidental, inadvertent and passive one.
>
> The statute under which the defendant is charged requires a specific wrongful intent to

conceal income known to exist as compared to a genuine misunderstanding of what the law requires or the bona fide belief that certain receipts are not taxable.

When so qualified by the remainder of the instructions on willfulness, presumptive intent instructions have been held not to be prejudicially erroneous. *Legatos* v. *United States,* 222 F. 2d 678, 685-688 (C.A. 9th); *Bateman* v. *United States,* 212 F. 2d 61, 69-70 (C.A. 9th); *Banks* v. *United States,* 204 F. 2d 666 (C.A. 8th), remanded, 348 U.S. 905, reaffirmed, 223 F. 2d 884, 889-890 [following *Legatos, supra,* and *Bateman, supra*], petition for certiorari pending; *Imholte* v. *United States* (C.A. 8th), decided November 1, 1955, (1955 C.C.H. par. 9727) [following *Legatos, supra,* and *Bateman, supra*]. Cf. *McFee* v. *United States,*[25] 206 F. 2d 872 (C.A. 9th), remanded, 348 U.S. 905, reaffirmed, 221 F. 2d 807, certiorari denied, October 10, 1955; *Acers* v. *United States,* 164 U. S. 388, 390.

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[25] In *McFee, supra,* the trial court gave the following instruction (R. 419):

> The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly or intentionally did not report all his taxable income for the year 1945 and 1946 and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax.

No objection to this instruction was made at the trial. It was first raised on appeal by letter dated April 22, 1955, after appellant's Supplemental Brief had been filed. See record. There is no discussion of this matter in the Court's opinion.

In *Imholte* v. *United States* (C.A. 8th), decided November 1, 1955 (1955 C.C.H., par. 9727), defendant argued that the court had erred by instructing the jury that every person is presumed to intend "the natural consequences of his acts knowingly committed." The Court of Appeals said:

> As to (5), *Morissette* v. *United States,* 342 U.S. 246, *Bloch* v. *United States,* 221 F. 2d 786, and *Legatos* v. *United States,* 222 F. 2d 678, are cited in support of the criticism of that part of the charge which told the jury that every person is presumed to intend the natural consequences of his act knowingly committed. The *Bloch* and *Legatos* cases both involved charges of willful attempt to evade taxes under § 145(b). The *Bloch* case condemned an instruction as reversible error which told the jury that "the presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax." To the same effect is *Wardlaw* v. *United States,* 203 F. 2d 884. In the *Legatos* case the court recognized the vice of such an instruction but found that it was so qualified as not to be prejudicial. The *Morissette* case was a larceny case in which larcenous intent had erroneously not been treated as a necessary element of the offense. These cases establish the proposition that where intent is a necessary element of the offense, is not inherent in the act itself, but is a specific intent involving bad purpose and evil motive, that that specific intent must be proved by or clearly inferred from

the evidence, *Wardlaw* v. *United States, supra,* and the proof of such intent as an ingredient of the offense may not be eliminated by a presumption. *Morissette* v. *United States, supra.*

There may be a distinction between a case like this, where the question is whether the defendant intended to aid and abet another in the latter's intent and attempt to violate the law, and cases like those above referred to wherein the intent involved is that of the transgressor himself, which intent is a necessary ingredient of the latter's offense. But we draw no such distinction. The instruction had better not have been given. We are convinced, however, that as given in this case it was so qualified that, as in the *Legatos* case, and in *Banks* v. *United States,* 223 F. 2d 884, 889, the charge considered as a whole correctly stated the law with sufficient clarity as not to be misleading. See also *Bateman* v. *United States,* 212 F. 2d 61.

Appellant contends (Br. 108-109, 111-117) that the trial court erred in failing to give his requested instructions regarding carelessness, negligence, mistake, inadvertence, oversight, lack of knowledge, lack of concealment, ignorance, and failure to use diligence. From the instructions previously quoted (*Supra,* p. 58) it is apparent that these matters were substantially covered in the charge.[26]

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[26] The charge on willfulness included the following instructions (R. 860-863):

As you have noted, undoubtedly, the acts charged in the indictment are alleged to have been done willfully and knowingly. An act is done willfully if done voluntarily and purposely and with a specific intent to do that which the law forbids. Willfulness implies bad faith and an evil motive. An act is done

knowingly if done voluntarily or purposely, and not because of mistake, inadvertence or some other innocent reason.

With respect to intent, it may be proved by circumstantial evidence. It rarely can be established by any other means, because we know that while witnesses may see and hear and thus be able to give direct evidence of what a defendant does, or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

In determining the issue as to intent the jury is entitled to consider any act or acts done or omitted by the accused, and all facts and circumstances in evidence which may aid the determination of the state of mind. You are entitled to consider the motive, if any, of the defendant in connection with the various transactions involved as bearing upon the existence or non-existence of the required specific intent.

Evidence has been introduced tending to establish that the defendant was in the years in question involved in various difficulties, including litigation in an action for alienation of affections, marital difficulties with his wife Mary, divorce proceedings, and the like, and that by reason thereof the defendant transacted some of his business and maintained bank accounts in other names than his own to prevent the same from being seized in said litigation or by his wife Mary.

You are instructed that if you find from the evidence that the defendant was involved in such difficulties and carried on the said business transactions and bank accounts in names other than his own for the said purpose and reason, and that he did not resort to such practices for the purpose of concealing from the Government his true income and tax liability, such practices would not constitute concealment of his income or attempted evasion of his tax liability.

On the other hand, you may find the defendant had an intent to evade and defeat the payment of the tax, even though there was coupled with that intent the desire to suppress information for reasons not associated with the evasion of his taxes. Although you may find that the attempted concealment of the receipt of taxable income by the defendant was motivated in part by defendant's desire to hide such information from his wife or other persons than the Government, you may find in addition that the attempted concealment was also motivated by a desire to hide such income from the United

CONCLUSION

It is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

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December, 1955.

States in order to defraud the United States of moneys due as income taxes and with intent to defeat and evade such taxes. Of course, what you may find from the evidence is exclusively a matter for you, the jury, to determine.

Good faith on the part of a defendant is a complete defense to the charges set forth in the indictment. Thus, bona fide mistakes made in preparing or filing or failing to file a tax return are not to be considered by you as false or fraudulent statements or concealment of income within the scope of the charge made in the indictment, because willful tax evasion requires an intentional affirmative act as compared to an accidental, inadvertent and passive one.

The statute under which the defendant is charged requires a specific wrongful intent to conceal income known to exist as compared to a genuine misunderstanding of what the law requires or the bona fide belief that certain receipts are not taxable. Therefore, negligence, carelessness or mistake of a taxpayer in the handling of his accounts or in providing information to be used in preparing an income tax return, or in handling business affairs, is not in itself equivalent to the concealment of income or fraud with intent to evade tax. (Emphasis supplied.)

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UNT	EXHIBIT NUMBERS	RECORD REFERENCES
Elwert	12, 14, 15	97 99, 105, 408,645
Elwert	11, 14, 15	94,96, 106, 408, 640
Schmidt	27, 36, 40	166-169, 185-186, 201, 204, 671-672
Elwert	8, 14, 15	66, 85, 105, 407-408, 635
	---	195-197, 674
Schmidt	16, 40	113-115, 161, 201-202, 408, 646
Elwert	17	117-119, 161-162, 408, 672-673
Schmidt	18	120-122, 162, 163, 670
Elwert	23, 40	129, 133, 138, 203, 409, 673
Leo Elwert	24, 40	129, 133, 139, 140, 202-203, 674
Payment for Legal Services	20, 25	129,130,131, 132,133,142, 143,147,409
A.D. Schmidt	21	129,133-134, 136,137,177, 409,647
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